IN THE COURT OF APPEALS OF IOWA

No. 9-788 / 08-1384
Filed January 22, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CALVIN CLARENCE NELSON JR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Don C. Nickerson, Judge.

A defendant appeals his judgment and sentence for first-degree murder. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, and Stephanie Cox and James Ward, Assistant County Attorneys, for appellee.

Heard by Sackett, C.J., and Vaitheswaran and Danilson, JJ.

VAITHESWARAN, J.

Calvin Nelson appeals his judgment and sentence for first-degree murder. He contends the district court abused its discretion in allowing the State to introduce evidence that he was a drug dealer.

I. Background Facts and Proceedings

Michael Collins and his girlfriend, Tracy Lewis, drove to a Des Moines neighborhood to purchase crack cocaine. Collins got out of the car and began walking along the street in search of someone who would sell him the drug. He was gone for about twenty minutes when Lewis heard a "pop pop" sound, like firecrackers. Lewis drove along the street Collins had traversed and found him lying in the grass with two gun-shot wounds.

A passerby, who heard the gun shots and stopped to render assistance, called 911. Police arrived to investigate. Collins was later pronounced dead.

Hours after the crime was committed, a boy who lived in a duplex next to the one previously occupied by Nelson found a gun under a rock in his backyard. The boy's mother called the police, who confiscated the gun. The same day, Nelson telephoned the boy's mother repeatedly, at one point asking her if she saw him in her backyard early that morning. The police were contacted again. Officers arrested Nelson, and the State charged him with first-degree murder.

Prior to his jury trial, Nelson filed a motion in limine seeking, in relevant part, to prevent the State from introducing evidence of "drug dealing." The State responded that a police officer's testimony concerning the purchase of drugs would assist the jury in understanding the facts of the case and this evidence would not prejudice Nelson because the officer would "not offer any opinion as to

whether the defendant is a drug dealer." The district court reserved ruling until trial.

At trial, Nelson's girlfriend, Dody Lester, alluded to Nelson's drug-dealing. She also placed Nelson at the scene of the crime and testified that Nelson shot Collins twice, believing him to be a police officer.

Following this testimony, the State sought to introduce evidence that Nelson was a drug-dealer. The evidence was to come in through three Des Moines police officers. In response to an offer of proof, the district court excluded Officer Chris Hardy's proposed testimony concerning a dime bag of marijuana found in Nelson's possession but allowed his remaining testimony.

Based on his experience as an undercover narcotics officer, Hardy testified that certain "items . . . would consistently be found with drug dealers." He said, "[B]aggies are consistent with crack cocaine sales." He continued,

> When the drug is weighed out, or the estimated weight is placed inside of the full size sandwich baggie, usually the white one like you would normally use to put a sandwich in, a knot is tied on that, and then it is either pulled or cut off, so you just have a little piece of crack cocaine, which is basically a little bit smaller than a garden pea, wrapped in cellophane plastic with a knot tied on it. That way it could be kept in your pocket or mouth, and it would not dissolve.

Officer Hardy did not stop with a description of the baggies. He testified that "somebody that's involved in that type of sales would [also] have a drug scale, either a gram scale or some type of digital scale" so that the dealer could "weigh your product . . . in front of the person that's buying it." Finally, Officer Hardy relayed a statement by Collins's girlfriend, Lewis, that "crack dealers killed [Collins], crack dealers shot him for 15 bucks, you know. That's the way they are."

A second officer testified that she searched Nelson's van and found an open box of "Ziploc-style" sandwich bags and a Ziploc baggie containing more baggies. The baggies and photographs of the baggies were admitted into evidence over Nelson's objections.

A third officer testified about an empty digital scale box that he discovered during his search of Nelson's residence. This evidence was again received over Nelson's objection.

The jury found Collins guilty of first-degree murder, and the district court imposed sentence.

On appeal, Collins challenges the cited testimony of Officer Hardy as well as the admission of the baggies and the empty digital scale box. He maintains this "prior bad acts" evidence was not relevant to the crime of murder but, if relevant, "its probative value was substantially outweighed by its prejudicial effect."

II. Analysis

As a preliminary matter, the State argues Nelson did not preserve error. We disagree. As previously indicated, Nelson filed a pre-trial motion in limine objecting to drug-dealing evidence. At trial, Nelson renewed his objection to Hardy's testimony and raised timely objections to the admission of the baggies and scale box. We conclude error was sufficiently preserved for appeal. *See State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005) (holding where a question is obvious and ruled upon by the district court, the issue is adequately preserved). Therefore, our review is for an abuse of discretion. *See State v. Crawley*, 633 N.W.2d 802, 807 (Iowa 2001).

The merits are governed by Iowa Rule of Evidence 5.404(*b*), which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Under this rule, "'[t]he court must first decide whether the evidence is relevant. If the court finds that it is, the court must then decide whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice.'" *Crawley*, 633 N.W.2d at 807 (citation omitted).

On the first question, we find the challenged evidence marginally relevant to complete the story of how Collins was shot. *See State v. Walters*, 426 N.W.2d 136, 140-41 (Iowa 1988); *State v. Shortridge*, 589 N.W.2d 76, 83 (Iowa Ct. App. 1998). We are not persuaded, however, that the evidence was relevant to Nelson's motive or intent, as the State contends.

Motive "is that which leads or tempts the mind to indulge in a criminal act." *State v. Knox*, 236 Iowa 499, 516, 18 N.W.2d 716, 724 (1945). "Although motive is not a necessary element of murder, lack of motive may be considered in determining whether an assailant acted with malice aforethought." *State v. Hoffer*, 383 N.W.2d 543, 549 (Iowa 1986).

The jury was instructed that "[m]alice aforethought may be inferred from the defendant's use of a dangerous weapon" and was further instructed that "[a] handgun is a dangerous weapon." The State introduced evidence that Nelson shot Collins twice with a handgun. Because malice aforethought could be

inferred from Nelson's use of the handgun, the State did not have a strong need to introduce evidence of Nelson's motive from which to infer malice aforethought.

Turning to the specific intent requirement, the jury was instructed that "'[s]pecific intent' means not only being aware of doing an act and doing it voluntarily, but in addition, doing it with a specific purpose in mind." Specific intent may be inferred from a person's intentional use of a deadly weapon in killing someone. *State v. Wilkens*, 346 N.W.2d 16, 20 (Iowa 1984). Given the evidence that Collins was killed with a gun, the State did not need the challenged evidence of drug-dealing to establish specific intent.

In short, while some evidence of drug-dealing was marginally relevant to complete the story of the crime, we agree with Nelson that "the State went too far in offering additional proof that defendant was a drug dealer."

This brings us to the prejudice prong of the "prior bad acts" test. "Unfair prejudice arises when the evidence would cause the jury to base its decision on something other than the proven facts and applicable law, such as sympathy for one party or a desire to punish a party." *State v. Taylor*, 689 N.W.2d 116, 124 (Iowa 2004).

The State concedes that "evidence of narcotics is inherently prejudicial," but argues (1) "where the crime committed is as callous as was committed here, the probative value of the evidence substantially outweighs its prejudicial effect," (2) "[i]n situations where involvement with controlled substances is relevant to show a defendant's motive, the evidence is admissible," and (3) "by the time the State offered evidence that the defendant possessed items that were consistent

with drug dealing, other evidence suggesting the same had already been offered."

The State's first argument is essentially an argument that the drug-dealing evidence was far less inflammatory than the evidence of the charged crime. *See State v. Larsen*, 512 N.W.2d 803, 808 (Iowa Ct. App. 1993) ("The potential prejudicial effect is neutralized by the equally reprehensible nature of the charged crime–the nighttime bombing of a house occupied by the prosecutor and his wife."). This argument would carry more force if the prior bad act did not involve drug-dealing. Evidence of drug dealing "appeal[s] to the jury's instinct to punish drug dealers," *State v. Liggins*, 524 N.W.2d 181, 188-89 (Iowa 1994), leading to a tendency "to decide the case on an improper basis." *Taylor*, 689 N.W.2d at 124. That tendency was reflected in Nelson's reported voir dire session with jurors, where one juror stated,[1]

> I think dealers are worse than serial killers, and they should be punished more because they don't go killing people because they are psycho, they kill people and families with drugs for money, so they should be eliminated, and I cannot serve on anything with drugs.

Here, the challenged evidence of drug-dealing was specific and, while marginally relevant to complete the story of the crime, primarily served to paint Nelson as a "bad person." *See Shawhan v. Polk County*, 420 N.W.2d 808, 810 (Iowa 1988). To that extent, the evidence was far more inflammatory than the evidence of the charged crime.

[1] The jury composition is not challenged on appeal. We simply cite the following statements to highlight the point made in our jurisprudence that evidence of drug-dealing may inflame the passions of jurors and cause them to determine guilt on that basis rather than evidence directly relating to the charged crime.

The State's second argument concerning the probative value of the challenged evidence on the question of motive has been addressed above. As noted, there was no strong need for the evidence to establish motive.

The State's third argument is essentially an argument that, even if the evidence should have been excluded, its admission was harmless error. *See* Iowa R. Evid. 5.103(*a*) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ."); *State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004) (stating where the same evidence is "overwhelmingly clear in the record, any error in the admission of the challenged evidence [i]s deemed not prejudicial"). This argument is appealing at first blush, given Lester's allusions to Nelson's drug-dealing. In particular, she testified that Nelson told her they had to go to the area where Collins was killed "to go make things right with a friend of his." According to Lester, "[h]e said somebody wanted some stuff and he didn't have it, . . . all he had was some gank," which Lester explained was "fake dope" drug dealers often sell to unsuspecting buyers. She later testified that Nelson told her he shot Collins because he thought "the guy was the police" and "trying to bust him for drugs."

Lester's testimony, however, was severely impugned. The district court made on-the-record observations that Lester appeared to be under the influence, going so far as to suggest that she be tested for drugs. In response to the court's observations, Lester admitted she smoked crack cocaine at least twice the night before she testified.

Recognizing that Lester's testimony had been called into question, the prosecutor argued that the State needed additional evidence of Nelson's drug

dealing to bolster Lester's credibility. The State understandably does not make this argument on appeal.[2] But its effective trial concession that Lester's testimony was problematic and needed reinforcement undercuts its present argument that the challenged drug-related evidence was simply a repetition of what she said.

In the face of Lester's impugned credibility, the evidence against Nelson was not overwhelming. *See Liggins*, 524 N.W.2d at 189 (determining evidence against defendant "was not so overwhelming as to cause us to ignore the [erroneous] ruling on the basis of harmless error"). No other witnesses placed Nelson or his van at the scene of the crime. In addition, there was no physical evidence linking Nelson to Collins's murder. Specifically, no fingerprints were discovered on the gun and no blood was found in Nelson's van or on his clothing. While we recognize that the circumstances surrounding the discovery of the gun and Nelson's repeated queries of his former neighbor convincingly tied him to the gun, that evidence did not tie him to the shooting. Based on this record, we cannot conclude that the State would have prevailed absent admission of the prejudicial bad-acts evidence. *See Sullivan*, 679 N.W.2d at 31.

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[2] The State arguably could not use the additional drug-dealing evidence to bolster Lester's testimony. *See State v. Mitchell*, 633 N.W.2d 295, 300 (Iowa 2001) ("A plea of not guilty in a criminal case places in issue the credibility of all the State's witnesses. If the State is allowed to prevail on its theory that there is an independent relevancy to bad-acts evidence for credibility purposes, this doctrine could be invoked in nearly every criminal case."). We recognize *Mitchell* may be distinguishable on the ground that it involved prior bad acts that were identical to the charged crime, unlike the drug-dealing evidence at issue here. However, as noted, the drug-dealing evidence was only marginally relevant to complete the story of the crime and there was no strong need for the evidence to establish motive or specific intent, the only other grounds cited by the State.

In reaching this conclusion, we acknowledge the broad discretion afforded trial judges in weighing probative value against probable dangers. *Taylor*, 689 N.W.2d at 124. We also recognize that the district court carefully weighed the probative value and prejudicial effect of other evidence, such as the bag of marijuana, and made a thorough record outside the presence of the jury on the challenged drug-related evidence. These factors, however, do not take away from our obligation to "presume prejudice . . . and *reverse* unless the record affirmatively establishes otherwise." *Sullivan*, 679 N.W.2d at 30. As the record does not affirmatively establish otherwise, we conclude the admission of the challenged drug-dealing evidence was not harmless error and requires reversal and remand for a new trial.

REVERSED AND REMANDED.